more interesting and readable for its audience. Time's writers who prepared the article must have known the statements as to Pape's conduct were only allegations in a complaint in a civil suit. As we put it (318 F.2d at page 655)— 'It is our opinion that a jury could read the Time article as stating that the Report said Pape and his follow (sic) officers *did* what the Commission Report merely said the Monroe complaint *alleged* they did.' "

"We hold that a sufficient showing has been made so that a jury could find Time, Incorporated acted with reckless disregard as to whether or not the reworded statements, hereinbefore described, were true or false. Therefore, it was error for the District Court to grant defendant's motion for a summary judgment."

The question presented rather is whether the knowing departure by Time's writers who prepared the article, from fidelity to the Commission's report was a reckless disregard of truth within the Supreme Court's definition of actual malice.

2. Illinois does not impose a stricter burden than the Supreme Court in *New York Times Co.* v. *Sullivan,* 1964, 376 U.S. 254, 84 S.Ct. 710, 11 L. ed. 2d 686, but even if it did it would be immaterial. The rule announced in *New York Times* v. *Sullivan* was a Federal rule of substantive law based upon constitutional guarantees which by definition is not bound by state precedent.

In *New York Times* v. *Sullivan* at page 706 Lawyers Edition, the Court says:

"The constitutional guarantees require, we think a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proved that

the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

REPLY TO PETITIONER'S STATEMENT OF THE CASE

In its statement of the case, petitioner asks the court to note the entire Commission Report: some 370 pages; the pleadings and record in *Monroe* v. *Pape,* and the Federal Civil Rights Act. However, the matter in the Commission's report concerning respondent to which petitioner makes reference in its article appears on page 20 of the Commission Report. The issue here is whether petitioner accurately reported that portion of the Commission Report, as it claims to have done.

All three courts that have examined the evidence, have held that petitioner did not accurately report the Commission's report. The District Court held that the failure was, at most, negligence. (App. 58). While the Court of Appeals for the Seventh Circuit has on two occasions held that the extent of petitioner's fault was for a jury to determine.

In the Court of Appeals' first opinion, *Pape* v. *Time,* 1963, 318 F2d 652, 655, the Court said:

> "The question before us involves not what the Commission Report of 307 pages says of Pape, but only what the Time article says about the Report. The reader is set by the introduction, conditioned by the Georgia incident and its stark ending, and prepared to read how the Chicago police treated Monroe's family in the very early morning while 'ostensibly' investigating a murder. Then the reader is told that Justice 'says' Pape and others *did* what the Report merely said Monroe's complaint *alleged* Pape and

> others had done. The closing paragraph, relied on by Time to immunize it from liability, says the officers were not punished—as the article earlier stated 'Y', in the Georgia incident, was not punished.
>
> "We conclude that Time took the risk, when it reworded parts of the Commission Report, that it might go too far . . ."

In its second opinion, *Pape* v. *Time,* the Court of Appeals said (Petitioner's Appendix A, page 6a):

> "We must now determine whether there is sufficient showing in the record before us that Time's statements were knowingly false or made with reckless disregard as to whether or not such statements were false.
>
> ". . . We hold that a sufficient showing has been made so that a jury could find Time, Incorporated, acted with reckless disregard as to whether or not the reworded statements, hereinbefore described, were true or false. Therefore, it was error for the District Court to grant defendant's motion for a summary judgment."

ARGUMENT

Reasons Why the Writ Should Not Be Granted

I.

As pointed out above, the fault of petitioner's article is not its failure to report the source as it would have this court believe but rather a deliberate alteration of the source material.

The complained-of publication in *New York Times* v. *Sullivan* was a paid-for advertisement, prepared by others and presented for inclusion in an edition of the New York Times. Admittedly, the New York Times was on constructive notice of the material in its files, but there was no showing of actual notice of the accuracy or inaccuracy of the advertisement except for the admission of an officer of the corporation that one statement in the publication was inaccurate.

The source of the Time article was the Commission Report. At least four people were involved in preparing the Time article, i.e., a researcher, writer, editor and publisher. Having the Commission Report before them, one of these persons then proceeded to alter the Report, deleting words, so as, in the words of Court of Appeals, to make the article more readable to its readers. In doing so, the Time article said that Pape did what the Commission Report only said he was accused of doing.

Petitioner says that this reckless handling of the Commission Report was negligence. Respondent claims it was willful and wanton, approximating malice.

Not content with simply altering the language of the Commission Report, Time proceeded to hammer home to its readers the truthfulness of the article. As the court said in *Pape* v. *Time, Incorporated,* 318 F2d 652:

> "Time's article introduced the reader to Justice as carrying 'a chilling text about police brutality' and that 'it stands as a grave indictment, since its facts were carefully investigated by field agents and it was signed by all six of the noted educators who comprise the Commission.' The reader is told, in a footnote, who the noted educators are. Time's second paragraph begins, 'The bluntly frank report tells of a police officer, referred to only as 'Y', in Dawson, Ga.' This and the third paragraph tell of the Georgia incident through quotations, detailing the police brutality, from the victim, Brazier, and his wife, and quotations from the Report. The third paragraph concludes in Time's statement, 'Brazier died five days later, and 'Y' was never punished.' In the fourth paragraph Time reported the Pape incident."

This court said in *New York Times* v. *Sullivan,* page 708, Lawyer's Edition:

> "We hold today that the Constitution delimits a State's power to award damages for liable in actions brought by public officials against critics of their official misconduct. Since this is such an action, the rule requiring proof of actual malice is applicable."

The Court of Appeals follows to the letter, this Court's direction:

> "The burden of proving actual malice is upon Pape. . . He does not claim the article was published with any deliberate attempt to harm him. . ."
>
> "We must now determine whether there is sufficient showing in the record before us that Time's state-

ments were knowingly false or made with reckless disregard as to whether or not such statements were false."

"We hold that a sufficient showing has been made so that a jury could find Time, Inc., acted with reckless disregard as to whether or not the reworded statements hereinabove described were true or false. . ."

Petitioner states (page 15 of its petition):

". . . the Seventh Circuit by its holding below has directed petitioner to retry that very lawsuit." i.e., *Monroe* v. *Pape*.

This same point, i.e., that the judgment of *Monroe* v. *Pape* is determinative of the issues here, was raised by petitioner in the Court of Appeals by motion and denied in the first appeal. (Petitioner's Appendix B, page 14A) and was the principal grounds for the Petition for Certiorari filed in No. 324, October Term, 1963, which this Court denied. In the reply to that petition respondent said:

"What petitioner really urges here, is collateral estoppel. If successful, its whole defense is the record of the jury's verdict in *Monroe* v. *Pape*.

"In *Yates* v. *United States*, 354 U.S. 298 (1957), the Court discussed the doctrine of collateral estoppel and, at page 336, says:

'That doctrine makes conclusive in subsequent proceedings only determinations of fact and mixed fact and law that were essential to the decision.'

"Thereafter, on page 338, the same opinion, the Court says:

'The normal rule is that a prior judgment need be given no conclusive effect at all unless it

> establishes one of the ultimate facts of an issue in the subsequent proceedings. So far as merely evidentiary or 'mediate' facts are concerned, the doctrine of collateral estoppel is inoperative. *The Evergreen* v. *Numan,* 142 F.2d 927; Restatement, Judgments, sec. 68, comment p. Cf. *Bordonaro Brothers Theatres, Inc.,* v. *Paramount Pictures, Inc.,* 203 F.2d 676, 678.'
>
> "In both the original and amended complaints in *Monroe* v. *Pape,* jurisdiction of the Federal Court was based upon 42 U.S.A., sec. 1983, which provides that 'every person who, under color of any statute . . . of any state . . . subjects . . . any citizen of the United States . . . within the jurisdiction thereof (to) the deprivation of any rights . . . secured by the Constitution and laws shall be liable to the party injured in an action . . . or other proper proceedings for redress.'
>
> "The verdict in *Monroe* v. *Pape,* if applicable to these proceedings at all under the doctrine of collateral estoppel, is of value only in its holding that Pape violated Monroe's rights reserved to him under 42 U.S.C.A. 1983. The verdict in no way found the evidentiary or 'mediate' facts which petitioner presses upon the Court in these proceedings, e.g., that Pape was guilty of assault, intimidation and brutality."

II.

Petitioner cites several Illinois authorities to the effect that plaintiff's claim is barred by its laws as well as *New York Times* v. *Sullivan. McDavitt* v. *Boyer,* 169 Ill. 475, is indicative of all the cases cited. The court there held that the law does not imply malice from actionable words uttered in privileged communication.

The law of libel in Illinois is stated in *Lorillard* v. *Field Enterprises, Inc.,* 1966, 65 Ill. App. 65. At page 73 the Court said:

"A newspaper has a right to publish facts and make fair comment thereon. If it goes beyond that, and the article is of and concerning the plaintiff, and it is not susceptible of an innocent construction, it is libelous. Inasmuch as the words are libelous per se, there can be no defense of fair comment and criticism. *Cooper* v. *Illinois Publishing & Printing Co.*, 218 Ill. App. 95; *Belt* v. *Tribune Co.*, 6 Ill. App. 2d 489, 128 NE2d 638; *Cook* v. *East Shore Newspapers, Inc., supra.* Since the article imputed a crime to the plaintiff, the language is per se libelous."

and on Page 78, the Court said:

"The last point that must be discussed relates to the issue of damages in cases where the words in question are found to be per se actionable. In order to recover punitive damages in a libel action some malice must be found. If the words are held to be per se actionable, the necessary malice is imputed from the words themselves; the law conclusively presumes malice in law, and general damages, without proof of loss or injury, are conclusively presumed. *Cook* v. *East Shore Newspapers, Inc.*, 327 Ill. App. 559, 595, 64 NE2d 751. In the *Cook* case it was also pointed out that where the article is libelous per se there may also be malice in fact, and the court said: 'Malice in fact is 'a formed design of doing mischief to another.' (*First National Bank of Flora* v. *Burkett*, 101, Ill. 391, 394.) It is also defined as follows: 'actual malice or malice in fact, means a positive desire and intention to annoy or injure another person.' (36 Am Jur p 681.)' The existence of actual malice may be inferred where a defamatory publication is made without proper cause or excuse. Where malice in law or actual malice exists punitive damages may be awarded. *Cooper* v. *Illinois Publishing & Printing Co.*, 218 Ill App 95; *Hintz* v. *Graupner*, 138 Ill 158, 27 NE 935.

"The plaintiff in the instant case may also recover actual or compensatory damages. If the words are libelous per se, it is not necessary to allege or prove special damages, both malice and damages being presumed. *White* v. *Bourguin, supra; Hambric* v. *Field Enterprises, Inc.,* 46 Ill App2d 355, 196 NE2d 489. Allegations of special damage or actual malice are not essential where the matter alleged to defame is libelous per se. *Estill* v. *Hearst Publ. Co.,* 186 F2d 1017 (7 Cir). Actual or compensatory damages also include general damages such as mental suffering and injury to reputation, and these need not be proved by evidence. *Van Norman* v. *Peoria Journal-Star, Inc.,* 31 Ill App 2d 314, 175 NE2d 805."

This Court in *New York Times* v. *Sullivan,* has established a Federal rule which enlarges the privilege of the press by giving it immunity as to mis-statements of fact regarding public officials and it imposes upon those public officials the burden of proving actual malice as defined in *New York Times* v. *Sullivan.* Petitioner here seeks to engraft onto a Federal rule a more stringent application than even this court intended.

Plaintiff's burden of proving malice in this instance should not be extended beyond that imposed upon him by the Court of Appeals. It is for a jury to determine whether petitioner acted with reckless disregard as to whether or not the reworded statements in its article were true or false.

CONCLUSION

For the foregoing reasons the petition for certiorari should be denied.

Respectfully submitted,

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